BRUNEI REPORT

Romzi bin Abdullah v Salwah bte Haji Saim

COURT OF APPEAL (BANDAR SERI BEGAWAN) — CIVIL APPEAL NO 1 OF 1992
KUTLU FUAD P, HUGGINS AND DEREK CONS COMMISSIONERS
27 MAY 1993

Contract *— Breach — Damages — Duty to mitigate — Sports car acquired on hire purchase in name of respondent until appellant obtained driving licence — Appellant to pay instalments — Failure of appellant to make payments — Dispute as to provenance of deposit — Whether respondent's claim for damages should be upheld*

This was an appeal against the decision of the trial judge giving judgment against the appellant in the sum of $31,440 with interest and dismissing the appellant's counterclaim. The facts of the case were that, the appellant was at the material time the boyfriend of the respondent. Although the appellant did not have a driving licence at the material time, he had acquired an interest in a Mitsubishi car ('the Mitsubishi') which was hired in the name of a third party under a hire-purchase agreement. The appellant intended to acquire a Toyota MR2 sports car ('the Toyota') but he was unable to do so in his own name without a driving licence. In order to overcome such difficulty, it was intended that the Toyota would be registered in the name of the respondent until such time as the appellant was granted a driving licence when he would be substituted in place of the respondent as the registered owner of the Toyota. The appellant was to pay the monthly instalments of the Toyota but there was a dispute as to the provenance of the deposit for the Toyota of $8,500. The respondent's case was that the entire deposit was to be paid by the appellant. It was alleged by the appellant that $1,000 would be paid by him in cash and that the balance of $7,500 was to be paid by the respondent for the transfer to her of the appellant's interest and obligations under the hire-purchase agreement relating to the Mitsubishi. The respondent denied having agreed to take over the Mitsubishi, but stated that she found one Miss Kasmah to buy the Mitsubishi and that Miss Kasmah delivered a cheque for $7,000 which was handed to the vendor company supplying the Toyota ('the vendor'). The said cheque for $7,000 was dishonoured. As only $1,000 had been paid towards the deposit, the vendor sued the respondent for the balance and judgment therefore was entered against her. The appellant did not pay the instalments on the Toyota and the respondent paid such instalments until June 1991 when she invited the finance company to repossess the Toyota. The respondent also paid one of the instalments on the Mitsubishi but the appellant paid the rest of the instalments. The respondent sued the appellant for damages for breach of contract.

Held, dismissing the appeal:

(1) If, as the trial judge found, the payment for the transfer of the appellant's interest in the Mitsubishi would be used to enable the appellant to pay the deposit on the Toyota, the Toyota agreement must be conditional upon the Mitsubishi agreement, whether that agreement was for a transfer to the respondent herself or for her to find a buyer. The fact that the appellant could himself have found a buyer for the Mitsubishi was no reason for rejecting the respondent's evidence that he asked her to find a buyer. There was ample evidence upon which the trial judge could properly find for the respondent on the issue of liability.

(2) The respondent did not repudiate the hire-purchase agreement in respect of the Toyota as soon as she knew that the appellant was unwilling to pay the deposit to the vendor. However, the respondent was a trustee of the Toyota on behalf of the appellant and she would have required express instructions from him to dispose of the rights under the hire-purchase agreement relating to the Toyota but such instructions were never given. It was also material that her decision to retain the Toyota was made upon legal advice. In the circumstances the respondent was not shown to have failed to take any reasonable steps to mitigate her losses.

(3) As regards the sum of $7,800 paid by the respondent under the judgment against her in favour of the vendor of the Toyota, the respondent has sued not only the appellant but also two other defendants for the same amount and had already obtained default judgments against those defendants. It was not suggested that those default judgments have been satisfied and the court found no valid ground for refusing a like judgment against the appellant.

Per curiam:

The court rejected the argument on behalf of the respondent that there was no duty to mitigate because the claim was not for general damages but for a series of lump sums, on the ground that the claim was for damages for breach of contract and it matters not that under some of the heads of damage specific sums were claimed.

Case referred to

1 *White and Carter (Councils) Ltd v McGregor* [1962] AC 413; [1961] 3 All ER 1178; [1962] 2 WLR 17 (refd)

Norila Abu Hassan (*Yu & Chiew*) for the appellant.
David Clidero (*David Clidero & Co*) for the respondent.

Cur Adv Vult

Huggins C (delivering the judgment of the court): The respondent plaintiff sued the appellant for damages for breach of contract and was awarded $31,440 with interest. The counterclaim for repayment of money paid by the appellant and for sums alleged to be due under another contract was

dismissed. The appellant appeals against the judgment on both the claim and counterclaim. A

The parties were army officers serving in the Royal Brunei Armed Forces. The appellant was at the material time the boyfriend of the respondent. He appears to have had a pleasure in motor cars, although he did not have a driving licence. He had acquired an interest in a Mitsubishi car (registered No BE 310) which had been hired in the name of a third party under a hire-purchase agreement. Both the appellant and the respondent had used this car, but the appellant wished to acquire a sports car, and he sought the assistance of the respondent in doing so. It is common ground that, in order to overcome the difficulty that the appellant had no driving licence and was, therefore, unable to acquire a vehicle in his own name, he would hire a Toyota MR2 on hire purchase in the name of the respondent. It would be registered in her name until such time as the appellant was granted a driving licence, but his name should then be substituted as that of the registered owner. The finance for the hire purchase of the Toyota was to be provided by the appellant: he was to pay the monthly instalments to the finance company, but there is a dispute as to the provenance of the deposit. The respondent's evidence was that the entire deposit ($8,500) was likewise to be paid by the appellant. His evidence was that he was to pay only $1,000 towards the deposit in cash and that the balance of $7,500 was to come from the price to be paid by the respondent for a transfer to her of the appellant's interest and obligations under the hire-purchase agreement relating to the Mitsubishi, a car which (he said) she had come to love. Indeed, the appellant maintains that the hiring of the Toyota was conditional upon the respondent's putting up the deposit on the Mitsubishi, as he had no other source of funds to pay the deposit on the Toyota. The respondent denies that she agreed to take over the Mitsubishi, but says that she did offer to find a buyer and that upon a sale of that car the sum payable to the appellant therefore would go towards the deposit on the Toyota. She says that she found a buyer (a Miss Kasmah) and that a cheque for $7,000 (a sum, it should be noted, which was not equal to the balance of the deposit payable in respect of the Toyota) was received from Miss Kasmah and handed to a salesman of the company supplying the Toyota. That cheque was dishonoured.

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The hire-purchase contract relating to the Toyota was duly executed and, as only $1,000 had been paid towards the deposit, the vendor sued the respondent for the balance. Judgment was entered against her, for clearly she had no defence. As the appellant did not pay the instalments to the finance company the respondent paid them until June 1991, when she invited the finance company to repossess the Toyota. They did so. The respondent also paid at least one of the instalments which fell due in respect of the Mitsubishi, but she said that she did that not because she was liable as the transferee of the hire-purchase obligation but because the appellant asked her to do so. She said that the appellant paid the rest of the instalments.

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The judge believed the evidence of the respondent that she did not agree to buy the Mitsubishi herself but that she was to find a buyer. He rejected the appellant's evidence that the acquisition of the Toyota was conditional

upon the respondent's paying $7,500 towards the deposit and that she would pay that sum on his behalf to the vendor of the Toyota.

The appellant now contends that the finding 'that the appellant agreed to buy the [Toyota] regardless of whether the old car was sold or not' was against the weight of the evidence. The very form of this ground of appeal is hardly consistent with his assertion that the respondent had actually agreed to take over the Mitsubishi herself. Moreover, para (d) of the first ground of appeal was:

> The learned judge further failed to take into account the benefit the respondent would derive from helping the appellant to procure a buyer for the appellant's old car.

The judge having found that the transfer of the Toyota was not dependent upon the transfer of the Mitsubishi, the respondent would have derived no benefit from helping the appellant to procure a buyer for the appellant's old car.

The other reasons advanced for contending that the judge was in error in his finding that the transfer of the Toyota was an independent transaction are equally unconvincing and, insofar as they alleged that the judge failed to consider various matters, those matters are not inconsistent with the respondent's story.

The strongest argument was that, if (as the respondent admitted and as the judge found) the payment for the transfer of the interest in the Mitsubishi would be used to enable the appellant to pay the deposit on the Toyota, the Toyota agreement must have been conditional upon the Mitsubishi agreement, whether that agreement was for a transfer to the respondent herself or for her to find a buyer. The judge no doubt took the view that the payment of the Toyota deposit would be made by handing over the transfer fee for the Mitsubishi if, as the parties believed to be the position, a buyer had in fact been found and therefore the deposit on the Toyota could be paid. That would be a reasonable interpretation of the evidence.

It is true that on the respondent's version of the facts the respondent was under no obligation to pay any instalment in respect of the Mitsubishi, but she was on terms of intimate friendship with the appellant and was obviously anxious to help him. She said that the appellant told her initially that he would get a government loan to help finance the Toyota transaction, but that when he was unable to get the money from that source she presumed that he had 'other sources'. There was no contradiction in her evidence, as was suggested. The fact that the appellant could himself have found a buyer for the Mitsubishi was no reason for rejecting the respondent's evidence that he asked her to find a buyer.

In my view there was ample evidence upon which the judge could properly find for the respondent upon the issue of liability, and there is no ground upon which we could say that he came to a wrong conclusion upon that issue.

In relation to the damages it is submitted, first, that the judge was wrong to hold that the appellant had failed to establish that the respondent ought to have mitigated the damage which she claimed to have suffered. On behalf of the respondent it was argued that there was no duty to mitigate,

because the claim was not for general damages but for a series of lump sums, and she relied upon *White and Carter (Councils) Ltd v McGregor.*[1] I reject that argument: the claim was for damages for breach of contract and it matters not that under some of the heads of damage specific sums were claimed.

The main complaint of the appellant is that the respondent did not repudiate the hire-purchase agreement in respect of the Toyota as soon as she knew that the appellant was unwilling to pay the deposit to the vendor: the car could then have been sold for more than was eventually obtained for it and the respondent would have avoided payment of many months' instalments. However, one does not know what damages the respondent would have had to pay to the hire-purchase company for breach of their agreement: it is notorious that new cars depreciate in value the moment they are put on the road. Furthermore, the respondent was a trustee of the Toyota on behalf of the appellant and she would have required express instructions from him to dispose of the rights under the Toyota hire-purchase agreement. Such instructions were never given, because the appellant was contending that his authority to her to acquire the car on hire purchase was conditional upon her taking a transfer of the Mitsubishi. It is material also that her decision to retain the car was made upon legal advice. The judge said that the respondent had taken reasonable steps to mitigate her loss. I would prefer to express it as that the respondent was not shown to have failed to take any reasonable steps to mitigate her loss, but the effect is the same.

Finally it was complained that the judge should not have awarded as damages the sum of $7,800 paid by the respondent under the judgment against her in favour of the vendor of the Toyota. The basis of this contention is that the respondent has sued not only the appellant but also two other defendants for the same amount and has already obtained default judgments against those defendants. It is not suggested that those default judgments have been satisfied and I see no valid ground for refusing a like judgment against the appellant. Of course, the respondent should not be allowed to recover the same amount under more than one of the judgments.

For these reasons I would dismiss the appeal on the claim, and it necessarily follows that I would dismiss the appeal on the counterclaim.

Kutlu Fuad P: I agree that the appeal should be dismissed for the reasons given by my Lord.

Derek Cons C: I agree also.

Appeal dismissed.

Reported by Yap Foo Ken